

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>Effie Stewart, et al.,</b>	)	
<b>Plaintiffs</b>	)	<b>CASE NO. 5:02CV2028</b>
	)	
<b>v.</b>	)	<b>Judge Dowd</b>
	)	
<b>J. Kenneth Blackwell, et al.,</b>	)	<b>Magistrate Judge Gallas</b>
<b>Defendants</b>	)	
	)	
	)	

**PLAINTIFFS' REPLY TO OPPOSITION TO MOTION FOR SUMMARY  
JUDGMENT BY DEFENDANTS STATE OF OHIO, HAMILTON COUNTY,  
MONTGOMERY COUNTY, AND SUMMIT COUNTY**

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## I. INTRODUCTION

The Defendants' memorandum in opposition to the Plaintiffs' motion for summary judgment is a masterpiece of misdirection. That memorandum purports to expose a plethora of contradictions, omissions, and overstatements in the Plaintiffs' case. But deeper examination reveals Defendants' assertions to be nothing more than an artful attempt to deflect attention from the undisputed points of fact and law supporting Plaintiffs' motion for summary judgment. Instead of facing the fact that Ohio continues to use unreliable voting equipment, Defendants fundamentally misconceive the evidence and law that Plaintiffs have placed before the Court in this matter and misstate the basis for Plaintiffs' claims.

The theme of the Defendants' brief is that the Plaintiffs' case is fraught with contradictions. Yet *all* of these supposed contradictions are entirely of their own making, and do nothing more than divert attention from the key points of fact and law that underlie Plaintiffs' Fourteenth Amendment and Voting Rights Act claims. For purposes of this motion, the key points that remain uncontroverted are:

- That the Fourteenth Amendment requires that election practices be subjected to strict scrutiny if they have an impact on the right to vote, a point that Defendants admit. State's Brief (Doc. 173) at 21.
- That the evidence in this case shows that the use of non-notice punch card and optical scan systems have an impact on the right to vote, resulting in more residual votes [or alternatively overvotes and undervotes] in the counties that use this technology.
- That Section 2 of the Voting Rights Act applies not only to intentional racial discrimination, but also to practices that result in the disproportionate denial of minority votes.
- That the use of non-notice voting equipment results in *intra*-county racial disparities and, specifically, in more overvotes and undervotes among African

American than white voters in the three counties that are the focus of Plaintiffs' Voting Rights Act claim (Montgomery, Hamilton and Summit).

While Defendants' may attempt to run from these points of fact and law, they ultimately cannot hide from them. Accordingly, there is no dispute as to the material facts underlying Plaintiffs' Fourteenth Amendment and Voting Rights Act claims. There is also no dispute over the fact that Ohio's failure to replace its antiquated voting equipment threatens serious harm to the state's voters. As hard as Defendants may fight to deny this possibility, *Defendant Blackwell himself has admitted* that the continuing use of punch card voting machines in Ohio risks a "Florida-like calamity."

It is therefore false to suggest that there is any contradiction in Plaintiffs' position on the pivotal points of fact and law in this case. As explained more fully below, the evidence of record amply demonstrates that: (1) the use of non-notice punch card and optical scan system results in *inter-county* disparities in the treatment accorded to citizens' votes, in violation of the Fourteenth Amendment; and (2) the use of that same equipment within three punch card counties results in *intra-county* racial disparities that violate Section 2 of the Voting Rights Act.

## **II. STATEMENT OF FACTS**

Defendants contend that the Plaintiffs fail to advance any admissible evidence in support of their claims. However, there is a long list of undisputed facts that Plaintiffs have demonstrated in support of their claims:

- The State Defendants have certified a variety of systems for use in Ohio elections, including equipment that provides actual notice of voting mistakes and equipment that does not. In this sense, Ohio voting officials have created a dual balloting system.

- The County Defendants have selected punch card balloting equipment that does not provide voters with actual notice of error.
- The punch card balloting system has a long history of problems including hanging chads, ballots that cannot be readily checked by voters to determine if mistakes have been made, and ballot cards with chads that become dislodged upon repeated tabulations. In the 2000 presidential election in the State of Ohio, the highest percentages of residual votes (*i.e.*, ballots for which no valid vote was recorded) occurred in counties that used non-notice voting equipment, such as punch cards and optical scan systems with central tabulation.
- Even Defendants' own expert has acknowledged that punch card voting machines resulted in substantially more residual votes than any other system in the 1992, 1996 and 2000 presidential elections. In particular, Dr. Lott's report states that Votomatic-style punch card machines had a residual vote rate of 2.4%,<sup>1</sup> compared to 1.0% for electronic machines, 1.43% for lever machines, and 2.01% for optical scans. Lott Report (Doc. 171-6a), Table 3.
- In fact, the dataset relied on by Dr. Lott shows that punch card machines have an even more dramatic impact than his report would indicate, resulting in a residual vote rate of 2.29% for punch cards, compared to 0.94% for electronic machines, 1.04% for lever machines, and 1.15 for precinct-count optical scans.<sup>2</sup>
- The level of residual votes on lower-level offices, also known as "down-ticket" races, is not a reliable measure of the accuracy of different voting machines, since there are multiple factors other than the machines themselves that may affect whether citizens choose to cast votes in down-ticket races. Deposition of John Lott (Doc. 171-6b).
- Plaintiffs use three methods to estimate voting behavior by race: homogeneous precinct analysis, ecological regression, and ecological inference. Federal courts have approved all three methods for use in voting rights cases. In contrast, no reported federal voting rights decision has endorsed the negative binomial regression approach that Defendants' expert has utilized.
- These three methodologies indicate that: (1) African Americans in Hamilton County overvoted in the 2000 presidential election at a rate that is *6-7 times as high as whites*; (2) African Americans in Summit County overvoted at a rate that is *6-10 times as high as whites*; and (3) African Americans in Montgomery County cast invalid votes at a rate that is *2 times as high as whites*.<sup>3</sup>

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<sup>1</sup> Datavote punch card machines performed even more poorly, according to Dr. Lott's report, with a residual vote rate of 3.5% in the 1992-2000 presidential elections.

<sup>2</sup> The discrepancy arises from the fact that Dr. Lott averaged the unweighted mean among wards in each county. Plaintiffs' MSJ Brief (Doc. 171) at 22. The result of this flawed methodology is to give smaller wards a weight disproportionate to their size.

<sup>3</sup> All of these findings are statistically significant at the .05 level or above.

- In Franklin County, where voters use electronic touchscreens that provide actual notice of error, overvoting is impossible. In Franklin County, the estimated rate of undervoting among African American voters (which ranged from 1.1%-1.3%) was anywhere between 3 and 5 percentage points below that of Summit County and approximately .5% below that of Hamilton County.
- Approximately .77% of all voters intentionally cast undervotes in presidential elections, and this figure does not differ based on race, age, or gender.
- All three of the Defendant Counties experienced undervoting rates that were substantially higher than .77%. In contrast, the rate of undervoting in Franklin County for all voters is almost precisely that (it ranges between .65 and .84%).

At the start of their brief, Defendants purport to raise several “contradictions” in Plaintiffs’ evidence. A review of the evidence, however, reveals that the only contradiction that really exists is between the arguments made in Defendants’ brief and the evidence that comes from Defendants’ own files – and, indeed, from the Secretary of State’s own mouth.

Secretary of State Blackwell himself has acknowledged that: “With Ohio slated by both national parties as a battleground state, the possibility of a close election with punch cards as the state’s primary voting device invites a Florida-like calamity.” Letter of J. Kenneth Blackwell to Honorable Doug White (Doc. 159), at 3 (original emphasis). Defendants attempt to minimize the impact of this admission, by suggesting that it contradicts statements made by Plaintiffs’ expert Dr. Asher, who testified that Ohio has a “better-run” electoral system than Florida. Asher Deposition (Doc. 171-5e) at 66. Dr. Asher’s statement arose in the context of general remarks concerning the *overall* condition of the election system in Ohio, including whether voter registration records were accurate. Prior to Dr. Asher’s reference to Ohio’s system, he noted that Ohio did not use the “butterfly ballot,” as did Florida in 2000, and that because of Ohio’s ballot-

rotation system, it would have been "hard to make a mistake in voting for George Bush because he was always No. 1 because Florida law said that the Presidential candidate who happens to be the same political party as the governor...." *Id.* at 62-63. Thus, to the extent that Asher was comparing Ohio favorably to Florida, that comparison had nothing to do with the nature of the actual voting machines used by either state. It is perfectly consistent for Asher to describe the other aspects of Ohio's electoral system as sound and yet express grave concern about the problems of unequal voting technology and the consequent disfranchisement of African-American voters.

The use of punch cards results in more lost presidential votes than other voting machines used in the State of Ohio. That fact is established by the State's own data, summarized in Plaintiffs' opening brief (Doc. 171 at p. 22) and Plaintiffs' opposition to Defendants' motion for summary judgment (Doc. 187, App. E). Defendants seek to obscure the clarity of these statewide statistics, by myopically focusing on a false comparison between two counties with very different demographics. In particular, they assert that in the 2000 presidential election, Delaware County had a residual vote rate of .99% with a punch card system, only slightly higher than the residual vote rate of Franklin County (.89%) which uses electronic voting machines. This point, however, obscures the fact that statewide punch card voting machines result in many more lost presidential votes than other kinds of voting systems – a fact that Defendants do not deny, but instead choose to ignore.

Defendants' Franklin/Delaware comparison also ignores the very different demographics of the two counties. See Appendix A (census comparison of Delaware County to Defendant Counties and Franklin County). Delaware County stands apart

from Franklin and the Defendant Counties in every demographic and socio-economic measure. Because the act of voting involves the interaction between the human user and the balloting equipment, it is disingenuous to ignore fundamental information about the human user in the analysis of voter mistakes, as the Defendants would have the Court do. Comparatively speaking, Delaware County is an affluent, heavily white, and well-educated area. As Plaintiffs' expert evidence shows, such counties suffer much less of an adverse impact from punch card voting machines, compared to counties – such as Hamilton, Montgomery, and Summit – whose citizenry is less educated, less affluent, and more heavily African American.

Consistently, the evidence in this case points to racial disparities in the percentage of overvotes in the Defendant Counties. Consistently, it shows that the actual notice balloting system in Franklin County eliminates these overvotes entirely. And consistently, it demonstrates that the actual notice balloting system in Franklin County reduces both the percentage of undervotes and the role of race in residual balloting at the top of the ballot.

### **III. ARGUMENT**

#### **A. Plaintiffs Are Entitled to Summary Judgment on Their Fourteenth Amendment Claim, Because the Uncontroverted Evidence Shows that Defendants' Use of Voting Equipment with Substantially Different Levels of Accuracy Has a Pronounced Impact on the Right to Vote.**

##### **1. As Defendants Acknowledge, Strict Scrutiny Is the Constitutional Standard Applicable to an Election Practice That Has an Impact on the Fundamental Right to Vote.**

Plaintiffs' Fourteenth Amendment claim rests on the statewide disparities arising from the use of multiple types of voting systems. Plaintiffs contend that the continuing

use of notice *and* non-notice balloting violates the basic principle, stated in Bush v. Gore, 531 U.S. 98 (2000) and numerous other cases, that the state has a responsibility to accord “equal weight” to each vote and “equal dignity” to each voter. Id. at 104. Though Defendants may pretend otherwise, this equality principle was not invented in Bush, as Plaintiffs have noted in their Memorandum in Support of Summary Judgment (Doc. 171). It is no answer to argue that the use of punchcard voting machines is exempt from scrutiny, simply because that was not the precise practice that the Court held was unconstitutional in Bush v. Gore. What is significant about Bush is the Supreme Court's reaffirmation of the core principle of equality in the voting process.

Though Defendants attempt to evade application of this basic principle to the circumstances of this case, it bears emphasis that their brief *nowhere* disputes that election practices having an impact on the right to vote are subject to strict scrutiny. As set forth in one of the chief cases upon which Defendants rely, the pivotal question is whether the challenged practice “has an impact on [Plaintiffs'] ability to exercise the fundamental right to vote.” McDonald v. Bd. of Elect. Comm'rs of Chicago, 394 U.S. 802, 807 (1969), quoted in State's Brief Contra. (Doc. 186) at 22. Election practices that *do* have such an impact are subject to strict scrutiny, and may only be upheld if “necessary to promote a compelling state interest.” Mixon v. NAACP, 193 F.3d 389, 402 (6<sup>th</sup> Cir. 1999).<sup>4</sup> Because Defendants agree with Plaintiffs' statement of the relevant legal

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<sup>4</sup> As Plaintiffs have explained, the courts in McDonald and Mixon found that there was no impact on the right to vote and, therefore, that the practices at issue were subject to only rational basis review. Doc. 187 at 24-29. The election practice challenged here is of a markedly different character, with uncontradicted evidence showing that punch card and non-notice optical scan systems *do* have an impact – and a pronounced one – on the votes of those who must use them.

standard – namely, that an election practice is subject to strict scrutiny if it has an impact on the right to vote – Plaintiffs now turn to the application of this standard to this case.<sup>5</sup>

**2. The Uncontroverted Evidence Demonstrates that Error-Prone Punch Card and Optical Scan Voting Equipment Has a Severe Impact on the Right to Vote, and Is Therefore Subject to Strict Scrutiny**

Plaintiffs' equal protection claim arises from the inter-county disparities arising from the use of defective voting machines in some counties but not others within the state. The *Defendants' own data* show such statewide disparities in lost votes and that punch card voting machines have a residual vote rate over three times that of electronic and lever machines. Plaintiffs' MSJ Brief (Doc. 171) at 22; Plaintiffs' Brief Contra State (Doc. 187), App. E. In the 2000 presidential election, the punch card voting machines used in 69 Ohio counties had a residual vote rate of 2.3%, compared to 0.7% for electronic machines, 0.5% for lever machines, and 1.0% for precinct-count optical scan machines.<sup>6</sup> *Id.* Although central-count optical scan equipment (used in 11 counties in 2000) fared slightly better, this equipment also resulted in a residual vote rate of 1.8% -- somewhat better than punch cards, but substantially worse than all other types of voting equipment.

While it is certainly true that some non-votes are intentional, Plaintiffs have provided evidence that the percentage of intentional non-votes was 0.34% in 2000, and averaged 0.73% in presidential elections from 1980 to 2000.<sup>7</sup> Given this evidence, the statistical disparity between punch cards and other voting systems is even more glaring.

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<sup>5</sup> Defendants do not make any attempt to address Plaintiffs *due process* argument (set forth in Doc. 171 at 24-25; therefore, Plaintiffs confine their reply to the equal protection claim.

<sup>6</sup> The Datavote machines used in one Ohio county (Tuscarawas) fared even worse, with a residual vote rate of 2.9%.

<sup>7</sup> Defendants are therefore wrong to assert that Plaintiffs have failed to come forward with evidence, to support their claim that most non-votes at the top of the ticket are the reflection of an error, rather than a deliberate intention not to vote. State's MSJ Brief (Doc. 173), at 24-25. In fact, the evidence from Dr. Kropf regarding the percentage of intentional non-votes is *uncontroverted*.

Conservatively assuming an intentional non-vote rate of 0.3% in 2000, punch card machines had an error rate (i.e., *unintentional* non-vote rate) approximately *ten times* that of lever machines, *five times* that of electronic machines, and just under *three times* that of precinct-count optical scan systems. See Doc 171 at 18; Doc. 187, App. E.<sup>8</sup>

An analysis of the data for the presidential elections in 1992, 1996, and 2000 yields similar results. According to the dataset upon which Defendants' expert John Lott relied, the residual vote rate for punch card voting machines was 2.29% between 1992 and 2000, compared to 0.94% for electronic, 1.04% for lever, and 1.15% for precinct-count optical scans. Kropf. Aff. (Doc. 171-7b) at 5. Central-count optical scan systems fared only slightly better than punch cards, according to this data, with a residual vote rate of 2.14% in the 1992-2000 presidential contests. Although Dr. Lott's report is marred by his flawed methodology,<sup>9</sup> even he acknowledges that punch card machines had a significantly higher residual vote rate (2.4%) than electronic (1.0%), lever (1.4%), or optical scan machines (2.0%) in the presidential elections between 1992 and 2000.

Plaintiffs' expert testimony confirms what the State's own evidence shows: that the challenged voting equipment is substantially less accurate than other systems that are available and in use elsewhere. Several states have now abandoned the punch card, including Massachusetts, Wisconsin, Florida, and Georgia. Id. at 17. One can now add

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<sup>8</sup> These statistics are derived by subtracting intentional non-votes from the total residual vote rate. This calculation yields the following unintentional non-vote rates:

Punch cards (Votomatic & Datavote combined)	2.0% (2.3-.3)
Central-count optical scan	1.5% (1.8-.3)
Precinct-count optical scan	0.7% (1.0-.3)
Electronic	0.4% (.7-.3)
Lever	0.2% (.5-.3)

<sup>9</sup> As noted in Plaintiffs' opening brief, Dr. Lott averaged non-votes among different wards, regardless of their size. As a result, his analysis gives undue weight to smaller wards, in calculating the percentage of residual votes. While Defendants attempt to rehabilitate Lott's expert report in various ways, they nowhere deny the methodology he followed.

California to this list, which was ordered to replace its Votomatic-style punch cards effective March 1, 2004. Common Cause v. Jones, 2002 WL 1766410 (C.D.Cal. May 09, 2002) (final judgment ordering decertification).<sup>10</sup>

Instead of confronting these statewide disparities, Defendants focus on two isolated counties – Franklin and Delaware. State's Brief Contra (Doc. 186), at 19-20. They make much ado of the unremarkable fact that Franklin County, which uses electronic voting equipment, had only a slightly lower residual vote rate (0.89%) than Delaware County (0.99%) which uses punch cards. What Defendants completely overlook is that Plaintiffs' equal protection claim is based on the *statewide* inequalities arising from the use of punch card voting machines. While Delaware County may have a lower residual vote rate than other counties using this system, the evidence demonstrates that punch cards perform much more poorly than other systems statewide.

Nor can Defendants evade the substantial inter-county disparities arising from the use of punch card voting systems, by attempting to rely on down-ticket races. As set forth in Plaintiffs' opening brief, the "down ticket" races upon which Defendants rely tell us nothing about the accuracy of voting equipment. Plaintiffs' MSJ Brief (Doc. 171) at 20-21. Because citizens in different jurisdictions are voting for different candidates in different parts of the state, it is to be expected that such "roll-off" will vary from county

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<sup>10</sup> Defendants quibble with Plaintiffs' observation that Ohio is one of the few states that largely plans to conduct the forthcoming election on the "very same equipment" that led to problems in Florida's 2000 election – namely, the Votomatic-style punch card machine. State's Brief Contra (Doc. 186) at 23 (quoting Doc. 171, at 2). The State HAVA plans recently reprinted in the *Federal Register* verify that most states that used this punch card system in 2000 plan to have replaced it, in whole or in part, by the 2004 election cycle. See 69 F.R. 14001-15232 (Mar. 24, 2004). Of the 52 states and territories (including the District of Columbia and Puerto Rico), only 18 do *not* plan to have abandoned their punch card equipment entirely by 2004. By 2004, the punch card will have disappeared entirely from 11 of the states that used them in 2000, and "sizeable numbers of jurisdictions" in five other states will have switched to other systems. See [http://www.electiondataservices.com/EDSInc\\_VEStudy2004.pdf](http://www.electiondataservices.com/EDSInc_VEStudy2004.pdf). Nationwide, only 12.67% of precincts are expected to use punch card machines in 2004, compared to 29.33% in 2000.

to county, for reasons that have nothing to do with the accuracy of the voting equipment. See Deposition of Lott (Doc. 171-6b), at 170. And in the only non-presidential race in which voters throughout Ohio vote for the same candidate statewide – the U.S. Senate race – the dataset used by Defendants’ own expert supports the claim that punch card machines are less reliable than other voting systems. Doc. 171 at 21. In focusing on down-ticket races, Defendants miss the point that voters in different parts of the state are choosing between different candidates for State Senate, State House, and U.S. House races. In the only races in which residual votes could even arguably have any significance (President and U.S. Senate) punch card voting systems perform substantially worse than others.

Defendants attempt to argue that Plaintiffs’ equal protection argument, taken to its logical conclusion, would require that “only one voting machine could be used Statewide.” State’s Brief Contra (Doc. 186) at 21. While Plaintiffs would be pleased if Defendants implemented a uniform voting system, this Court need not mandate uniformity to grant Plaintiffs’ motion for summary judgment. As another federal court has explained in assessing a similar claim, the operative question is “whether a state may allow the use of different types of voting equipment with *substantially different levels of accuracy*, or if such a system violates equal protection.” Black v. McGuffage, 209 F. Supp. 2d 889, 898 (N.D. Ill. 2002); see also Southwest Voter Registration Education Project v. Shelley, 344 F.3d 882, 896 (9<sup>th</sup> Cir. 2003) (finding an equal protection violation, based on the “virtually undisputed” fact that “pre-scored punch card voting systems are significantly more prone to error than other voting systems used in

California”), overruled on other grounds, 344 F.3d 914 (9<sup>th</sup> Cir. 2003).<sup>11</sup> In this case, the evidence shows that punch card and central-count optical scan systems *do* have substantially worse levels of accuracy, compared to other voting equipment used in Ohio.

For this reason, Defendants are mistaken to argue that Plaintiffs' constitutional claim must be rejected because of the difficulty in defining where the constitutional line should be drawn. If Defendants' insistence on a bright-line rule were accepted, then *no* voting equipment – however prone to error – could ever be thrown out on equal protection grounds; so too the “one person, one vote” line of cases would have to be reversed, since the Court has never stated a bright-line rule for how much deviation from precise numerical equality is permissible. If Defendants' view were the law, then courts would therefore be compelled to uphold the use of a voting machine that discarded one out of every ten votes, or even one of two votes, on the ground that it is impossible to draw a clear line differentiating systems that discard some lesser number. It is, moreover, incorrect to suggest that no standard can be arrived at. As noted above, the Black v. McGuffage case sets forth a standard that would require Ohio's dual voting system to be struck down: whether or not the use of different voting systems generates “substantially different levels of accuracy.” 209 F. Supp. 2d at 898; see also Common Cause v. Jones, 213 F. Supp. 2d 1106, 1109 (C.D. Cal. 2001).

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<sup>11</sup> Defendants make much of the fact that the en banc Ninth Circuit overruled the three-judge panel's order in Southwest Voter, which had preliminarily enjoined the California recall election. But as Plaintiffs noted in their opening brief, the en banc court did *not* rule on the merits of the equal protection. Doc. 171, at 14 & n.14. Instead, the en banc court affirmed the district court's denial of a preliminary injunction, based on the harm to the state that would arise from postponement of an election that had “already begun.” 344 F.3d at 919; see also Case Comment, “Ninth Circuit Affirms Decision Not to Enjoin California Recall Election – Southwest Voter Registration Education Project v. Shelley, 344 F.3d 914 (9<sup>th</sup> Cir. 2003)(en banc),” 117 Harv. L. Rev. 2023, 2028 (2004) (“the en banc panel neither accepted nor rebutted the equal protection claim”). Notably, Defendants do *not* make any argument in support of their apparent view that the three-judge panel was wrong on the equal protection merits. Plaintiffs submit that, regardless of the propriety of its decision to issue a preliminary injunction, the three-judge panel opinion was correct to find an equal protection violation arising from the use of voting machines with significantly different accuracy rates.

**3. Plaintiffs' Motion for Summary Judgment Should Be Granted, Because Defendants Have Not Shown That the Continuing Use of Error-Prone Voting Equipment is Necessary to Serve a Compelling Interest, or Even That It Is Rationally Related to a Legitimate Interest.**

Because Plaintiffs have demonstrated that the use of punch card and central-count optical scan equipment has an impact on the right to vote, this election practice may only be upheld if it can survive strict scrutiny, which requires Defendants to show that the challenged practice is “necessary to promote a compelling state interest.” Mixon, 193 F.3d at 402. Defendants do not even attempt to argue that the use of error-prone equipment is narrowly tailored to a compelling interest. Accordingly, if this court concludes that the use of the challenged equipment has an impact on Plaintiffs' right to vote and therefore that strict scrutiny applies, then this practice violates the Equal Protection Clause.

Even if a lesser standard were applicable, which it is not, Plaintiffs should still be granted summary judgment. The only argument made in Defendants' brief for upholding their use of error-prone voting equipment is that “the decision to use punch cards is rational because of the cost of the system relative to other types of technology and also because of the potential security problems that exist in new systems.” State's Brief Contra (Doc. 186), at 22. But as noted in opposition to Defendants' motion for summary judgment, the Defendants have completely failed to introduce any evidence of greater costs with punch card voting machines. Plaintiffs' Brief Contra (Doc. 187), at 31. Furthermore, as a matter of law, costs are not a sufficient justification for failing to comply with a constitutional requirement. Id. at 31. As for security, Plaintiffs are not demanding conversion to any particular system – and, in particular, the state is free to move to a precinct-count optical scan system about which no security concerns have been

raised. Moreover, Defendant Blackwell himself has conducted an exhaustive study of the security of electronic voting systems, concluding that every identified security risk has been addressed by the State of Ohio. Letter of J. Kenneth Blackwell to Honorable Theresa Fedor, at 1. Accordingly, neither costs nor security constitutes a rational – let alone compelling – justification for the continued use of error-prone voting machines.

**B. Plaintiffs Are Entitled to Summary Judgment on Their Claim Under Section 2 of the Voting Rights Act, Because They Have Demonstrated That the Use of Punch Card Voting Machines Results in the Disproportionate Denial of African-Americans' Votes Within the Three Counties That Are the Subject of this Claim.**

In contrast to their Fourteenth Amendment claim, Plaintiffs' claim under Section 2 of the Voting Rights Act ("VRA") arises from *intra*-county racial disparities resulting from the use of punch card voting machines. More specifically, Plaintiffs have introduced evidence showing that the use of punch card machines within three counties (Montgomery, Summit, and Hamilton) results in the disproportionate denial of African American votes. Plaintiffs do *not* dispute that the use of punch card voting machines also denies many non-minority Ohioans the right to have their votes counted. In particular, it is unquestionably true that many white voters – in these three counties, in several Appalachian counties, and all other punch card counties – experience vote denial as the result of Ohio's antiquated voting technology. While this fact is germane to Plaintiffs' equal protection claim, which rests on the fact that punch card people of all races are denied the right to have their votes counted, it is beside the point for purposes of Plaintiffs' Voting Rights Act claim. The VRA claim, as Plaintiffs' have repeatedly emphasized, rests solely on racial disparities *within* the three subject counties – and

specifically, on the fact that punch card voting machines have a greater impact on black voters within those counties than they do on whites voters. Much of Defendants' argument in opposition to Plaintiffs' Section 2 claim is based on their failure to comprehend that the racial disparities giving rise to this claim are solely intra-county in nature. There can be no serious question that both the State and the County Defendants have an independent duty under the VRA to assure that African American voters participate on an equal basis with whites in the political process in each and every jurisdiction and election that occurs in the state. Plaintiffs' evidence of intra-county variations in the percentage of overvotes by race in the 2000 presidential election in Hamilton, Montgomery, and Summit Counties indisputably demonstrates that Defendants have breached this duty.

Defendants' complaint about the evidence Plaintiffs use to build their VRA argument arises from their failure to recognize the intra-county nature of this claim. In particular, Defendants ask how it is possible for the highest levels of residual balloting to occur in areas whose population is overwhelmingly African American, when problems also occur in Appalachian regions of the state where very small numbers of African Americans reside. These assertions, however, miss the point of Plaintiffs' argument. Plaintiffs' Section 2 claim rests on the fact that, within the three subject counties, the use of non-error correction voting technology has a disparate impact on African Americans.<sup>12</sup> Plaintiffs' evidence of African American disfranchisement is based on *precinct-level data*

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<sup>12</sup> Defendants' discussion of Cuyahoga County is also irrelevant to Plaintiffs' Section 2 claim, as we have noted many times before. The claim is an intra-county claim that only focuses on counties named in this case. Whether or not other counties' use of punch cards also generates racial disparities, it cannot excuse Defendants' ongoing violation of Section 2 in Hamilton, Summit, and Montgomery counties. *Every* state and *every* county has an obligation to follow the dictates of federal law in *every* election.

*from three counties* where large numbers of African Americans reside: Hamilton, Summit and Montgomery.

Plaintiffs have focused on these three counties because 1) significant numbers of persons within the VRA's protected class reside in them, and 2) detailed and accurate information about overvotes and undervotes in the 2000 presidential election is available on these counties. This data allows the comparative impact of voting technology upon minority and non-minority voters within counties to be assessed empirically.

Defendants use specious methodologies to examine three electoral cycles in Ohio. As noted in Plaintiffs' Motion for Summary Judgment, Defendants use unweighted data<sup>13</sup>, rely upon imprecise ward geography, fail to control for the ecological fallacy, and emphasize down-ballot elections in which voters throughout the state faced different candidates in substantively different electoral contests. The overriding methodology Defendants' expert employs, negative binomial regression, has never been approved for use in a voting rights case. Moreover, the Defendants' expert fails to incorporate statistical methods for estimating voting behavior by race that federal courts have approved for use in voting rights cases. These methods -- homogeneous precinct analysis, ecological regression, and ecological inference -- are fundamentally more reliable than the "top ten percent wards by race" analysis that Defendants' expert utilizes. In fact, the wards he identifies as being "black" for purposes of his statistical tests include at least one ward that is over 90% white.

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<sup>13</sup> The term "unweighted data" refers to a process by which statistical data receives equal weight regardless of how many persons it represents. For example, a ward with 1,000 voters would be treated equally with a ward of 300 voters. It is this technique that the Defendants' expert utilized. In contrast, when data are weighted by population, a ward or precinct with more voters is given more mathematical emphasis in direct proportion to its percentage of the overall population under study.

In addition to these numerous shortcomings, the Defendants' expert admitted that his own data did not support the conclusion he made in his report concerning the extent of residual balloting by race in down ballot elections. Contrary to his written finding that "the top 10 percent of wards by the percent of adults who are African-American or on the basis of Hispanics of all ages show lower rates of non-voted ballots (than for all white or the top 10 percent of wards with the highest percentages of adult whites)", Dr. Lott admitted under oath that this finding was in error. In fact, he conceded that the empirical findings in Table Four of his report showed that African Americans exhibit *higher* levels of residual balloting at the bottom of the ballot than do white voters:

Q: "So the bottom line is, Doctor, the black population is exhibiting higher levels of nonvoted ballots down the ballot compared to the top ten percent whites and the 100 percent white wards, is that correct?"

A: "That's right."

Deposition of Dr. John R. Lott (Doc. 171-6b) at 180-183. Thus, it is beyond dispute that based on the evidence both parties have introduced in this matter, the racial gap in residual balloting is exhibited in electoral contests both at the top and at the bottom of the ballot.

**C. Under Federal Rule of Civil Procedure 56, Plaintiffs are Entitled to Introduce the Affidavit of Martha Kropf, to Respond to the Erroneous and Misleading Statements Made in the Report of Defendants' Expert Witness, Which Would Otherwise Go Unrebutted.**

As a part of their motion for summary judgment, Plaintiffs filed an affidavit from one of their experts, Professor Martha Kropf. Dr. Kropf's affidavit consists of a rebuttal of the major arguments that Defendants' expert makes in his report. Dr. Kropf's report points out that Dr. Lott's methodology and conclusions are flawed in several crucial respects. Specifically, she notes that, contrary to the contentions set forth in Dr. Lott's

report: (1) voter lack of information rather than ballot fatigue is the primary reason for nonvoted ballots; (2) down-ballot races not faced by all Ohio voters in common are an invalid basis for statewide analysis; and (3) residual ballot data should be weighted by population to avoid giving smaller wards and counties undue weight. Because Dr. Kropf's affidavit is limited to addressing and rebutting the flaws in Dr. Lott's expert report, her affidavit is not accurately characterized as a supplemental report. As such, it does not contravene the provisions of this Court's Order of January 9, 2004.

The express provisions of F.R.C.P. 56 (a) and (e) permit parties moving for summary judgment to use supporting affidavits, and that is precisely what Plaintiffs have done here. Defendants have had ample opportunity to obtain a supporting affidavit from their own expert witness. This distinguishes the present case from situations in which parties have attempted to file affidavits *after* responses to summary judgment motions are due. In the latter situation, a motion to strike might be proper. Estes v. Kings Daughter Medical Center, 59 Fed. Appx. 749 (6<sup>th</sup> Cir. 2003) (expert affidavit filed one month after response to summary judgment motion was due held properly excluded from the evidence). But where an affidavit accompanies the initial summary judgment motion and the nonmoving party has an opportunity to respond, such affidavits have been allowed. Gilleland v. Schanhals, 55 Fed. Appx. 257 (6<sup>th</sup> Cir. 2003). Because the Kropf affidavit is in the nature of rebuttal, affidavits are expressly permitted by F.R.Civ. P. 56, and the Defendants have had ample opportunity to respond, the Defendants' motion to strike Dr. Kropf's affidavit as well as their request for Rule 37 sanctions should be denied.

Introduction of Dr. Kropf's affidavit is particularly warranted here, given that Plaintiffs would otherwise have no opportunity whatsoever to respond to the deeply

flawed data analysis contained in Dr. Lott's expert report. As set forth above and in Plaintiffs' opening brief, the conclusions asserted in Dr. Lott's report contradict the state's data and, indeed, are belied by the very dataset upon which he relied. It would be especially unfair to preclude Plaintiffs from introducing Dr. Kropf's affidavit here, when Defendants failed to produce Dr. Lott's dataset until Friday, February 13, 2004 -- 11 days after his report was due and 4 working days before Dr. Lott's deposition in this case. Defendants had every reason to expect that Plaintiffs would not let Dr. Lott's misleading data analysis stand unrebutted, and can only blame themselves to the extent they would have preferred to have more than four weeks to review and respond to Dr. Kropf's affidavit.

#### IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted.

Respectfully submitted,

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**Certificate of Service**

This is to certify that a copy of the foregoing was served upon all counsel of record via electronic filing on this 30th day of April, 2004.

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